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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DANIEL RASKOV, as Trustee, etc.,

Plaintiff and Appellant,

v.

DELIA BROAD RASKOV,

Defendant and Respondent.

E042666

(Super.Ct.No. INP019362)

OPINION

APPEAL from the Superior Court of Riverside County. James A. Cox, Judge.

Affirmed.

Orren & Orren, and Tyna Thall Orren, for Plaintiff and Appellant Daniel Raskov.

Best, Best & Krieger, G. Henry Welles, Kira L. Klatchko, and Douglas S. Phillips,
for Defendant and Respondent.

There is an ongoing dispute between defendant and respondent Delia Raskov (Delia) and her stepchildren, plaintiff and appellant Daniel Raskov (Daniel) and Michelle Aaronson (Michelle), over the trusts established by David Raskov (Father) and Delia. In this appeal, Daniel contends the probate court abused its discretion in sanctioning him

under Code of Civil Procedure section 128.7 for bringing a motion under Probate Code section 859¹ and not awarding double damages and attorney fees against Delia.

I. PROCEDURAL BACKGROUND AND FACTS

Delia was the trustee of two trusts: The David Raskov Inter Vivos Trust (IVT) and the Raskov Family Trust (RFT). The IVT was created on September 18, 1986 (and amended on October 19, 1990, and January 6, 2003), and the RFT was created by both Father and Delia. Father died on July 15, 2003, and both trusts became irrevocable.

On or about May 6, 2004, Daniel filed an application with the probate court (Riverside Superior Court case No. INP019362) for a determination as to whether he would be violating a no-contest provision in the IVT if he sought to remove Delia as trustee and appoint a successor, compel an accounting, and surcharge Delia for breach of trust. The trial court heard the application and found that the petition did not constitute a contest of either trust. Delia appealed, and on July 28, 2005, this court affirmed the underlying judgment, finding that the petition was not a contest and that Daniel was seeking to interpret and clarify ambiguities in the trust under Probate Code section 21305, subdivision (b)(9).²

Thereafter, Daniel amended his petition and sought an order requiring Delia and the custodian of her individual retirement account to return an asset (proceeds from the sale of a property in Los Angeles referred to as “L.A. property”) to the IVT, to remove

¹ All further statutory references are to the Probate Code unless otherwise noted.

² On June 10, 2008, we took judicial notice of the record in case No. E036931.

Delia as IVT Trustee, to require her to account for IVT assets, to appoint Daniel as Successor IVT Trustee, to reform and construe the IVT, and to order Delia to reimburse the IVT and Daniel for the attorney fees incurred to remedy Delia's alleged breach of trust and bad faith regarding the L.A. property.³ Following trial, the probate court filed its order on July 21, 2006. The court found that Father intended to retain IVT trust principal and distribute IVT net income. It also found that Delia, Daniel, and Michelle were effectively co-trustees of the IVT but that Delia was to run the IVT's day-to-day business. Regarding the "majority rule" provision of the no-contest clause, the court stated: "[T]he court finds that both Delia Raskov, as well as the two Raskov issue, took actions and/or made demands that were in violation of the Trust provisions. The Court declines to enforce the penalty provision against any of the beneficiaries, particularly in light of the Trust ambiguities that helped to precipitate this dispute." Regarding the L.A. property, the court found that Delia had made a mistake in selling it, she was a secured creditor holding \$54,000 in notes on the property, she knew the remaining interest in the property belonged to the IVT, and that she sold the property without giving notice to Daniel and Michelle.

The court granted Daniel's request to remove Delia as a co-trustee of the IVT. It ordered that the IVT pay Delia a \$1,500 per month stipend from IVT net monthly income, plus one-third of any remaining net monthly IVT income, and further ordered

³ Daniel also filed a petition in Riverside Superior Court case No. INP019363 regarding the RFT. He sought to confirm that Delia had only a life estate in the family home in Palm Springs and that she lacked the power to alter the four RFT beneficiaries. He also sought to remove her as RFT trustee.

that the stipend would continue throughout Delia's life provided no monthly payment to Delia would exceed actual net monthly income of the trust, and that there would be no distribution of principal during her life. Regarding attorney fees, the court reserved ruling for a separate hearing.

At the separate hearing on August 21, 2006,⁴ Daniel's counsel argued: "On the issue of Miss Raskov's recovery of any fees, of course we had contended during the trial and actually in posttrial briefing that [section] 859 of the Probate Code . . . would preclude her from recovering anything. But gather, without seeing it expressly from the court, that the court declined to do that. We also contended in those papers that she should be surcharged the amount of fees paid by the trust to us to win the case. And get the money back. Those are, again, contentions that the court apparently considered and did not accept in the course of reviewing and signing the final order . . . in the case." The court heard further argument from both sides as to the amount and allocation of the attorney fees. Specifically, Daniel's counsel suggested that Delia "personally be surcharged all of the attorney's fees and to put that in the trust in addition to the amount that you're asking to be recouped." The court asked, "If she be surcharged the amount that she paid?" Daniel's counsel replied, "Well, no, the amount of attorney's fees that the trust will have to pay because the trust has been damaged in that amount. And, in fact, under [section] 859 she would be surcharged twice for the damage. The court didn't do that. The court elected a conservative approach. But we advocate and think that is

⁴ At the August 21, 2006, hearing on the issue of attorney fees, Daniel was represented by Mark R. Stapke of Stapke & Harris.

appropriate.” Delia’s counsel stated the surcharge was “resolved by the court as they said conservatively. That would have been raised in the trial, Your Honor, and in the trial briefs and petitions, and—and it was denied by the court. So that . . . is not before us today. We’re here on an attorney fee allocation proceeding today.” Daniel’s counsel did not challenge or deny the representations of Delia’s counsel. Instead, he remained focused on the issue of surcharging Delia the full amount of the attorney’s fees. After hearing the argument of counsel, the court awarded \$120,000 in fees and costs to Daniel and Michelle and \$40,401 to Delia, and directed that all fees and costs be paid from the IVT. Neither party appealed the attorney fee order.

On October 26, 2006, Daniel filed a motion under section 859 to compel Delia to pay to the IVT double the amount of proceeds she retained from the sale of the L.A. property.⁵ The motion also sought to modify the attorney fee order so that Delia would be required to reimburse the IVT for the \$120,000 spent in attorney fees. Delia opposed the motion on the ground that it was an untimely motion for reconsideration of the court’s order after trial and subsequent award of attorney fees.

At the December 14, 2006, hearing on the motion,⁶ there was an issue as to whether the court’s prior order after trial left open the possibility that Daniel could bring

⁵ Daniel was represented by Paul K. Smith of Smith & Myers LLP. On November 15, 2006, Mark R. Stapke informed Delia’s counsel that a substitution of counsel had been executed and as of October 12, and that Mr. Stapke was no longer representing Daniel.

⁶ At this hearing, Daniel was represented by Mr. Smith of Smith & Myers, and Harris L. Cohen specially appeared with Mr. Smith.

[footnote continued on next page]

a section 859 motion.⁷ Regarding that order, the trial court responded, “I was giving the parties the opportunity to continue to file any objections to her account if they choose to do that, but I wasn’t reopening the issues as to damages. So I mean, this is totally untimely. [¶] And as I indicated before and under the circumstances of the case, because there were some acts involved on both sides, even though I do think that [Delia] didn’t act the way she should have acted, . . . under the circumstances of this case, I would not have given double damages anyway. I just wouldn’t have done it. And I took that—those were all run through my mind when I made my order and the order was made and the order is final. I’m not changing the damages.” The court further stated: “I can’t imagine that I would have said that . . . I was leaving it open for him to come back and ask for double damages. It was requested at the trial, it’s too late to request it now, and if he had requested it, I would have denied it.”

The probate court then denied Daniel’s section 859 motion on the grounds that it was an untimely motion for reconsideration.

On December 15, 2006, Delia filed a motion for sanctions under Code of Civil Procedure section 128.7 requesting that Daniel and his counsel, Paul Smith, be sanctioned for having brought the frivolous section 859 motion. Daniel opposed the

[footnote continued from previous page]

⁷ Section 859, in relevant part, provides: “If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to the estate of a . . . trust, the person shall be liable for twice the value of the property recovered by an action under this part. The remedy provided in this section shall be in addition to any other remedies available in law to a trustee”

motion. The motion was heard on January 19, 2007. The probate court found that sanctions against Daniel, only, were warranted in the amount of \$18,000 in attorney's fees. Daniel's counsel argued that the thrust of the motion was in reference to section 859's double remedy. However, the court found that "you can't split your cause of action. When you have a trial, you ask for all your damages that you think you're entitled to in that trial. You can't come back later after . . . the trial has been determined and a judgment is final and then all of a sudden decide you want to ask for something else in the same trial on the matter that's already been heard. . . . The judgment was final in this case. . . . And all of a sudden [Daniel] comes back and wants more money and files a motion . . . and claims huge damages against his stepmother. I can only conclude that it was done in bad faith."

The order granting the motion for sanctions under Code of Civil Procedure section 128.7 was filed on February 8, 2007. The court found that Daniel's section 859 motion seeking double damages and attorney fees was without merit and that he made false statements when declaring that Delia had failed to produce requested documents. The court awarded \$18,000 to Delia against Daniel. On March 19, 2007, Daniel filed this appeal.

II. DISCUSSION

Daniel challenges the probate court's order sanctioning him under Code of Civil Procedure section 128.7.⁸ An award of sanctions is discretionary. (*Day v. Collingwood*

⁸ We note that Daniel is now represented by Tyna Thall Orren of Orren & Orren.

(2006) 144 Cal.App.4th 1116, 1130.) We therefore review a trial court's order imposing sanctions for abuse of discretion. (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167.) In reviewing an order granting or denying sanctions, we presume the trial court's order is correct and we are not permitted to substitute our judgment for that of the trial judge. (*Shelton v. Rancho Mortgage & Investment Corp.* (2002) 94 Cal.App.4th 1337, 1345.) To be entitled to relief on appeal from an alleged abuse of discretion, the court's action must be sufficiently grave to amount to a manifest miscarriage of justice. (*Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867.)

In relevant part, Code of Civil Procedure section 128.7 provides that the filing of a pleading certifies that, to the attorney or unrepresented party's knowledge, information, and belief, the pleading is not being presented primarily for an improper purpose, the claims, defenses and other legal contentions contained in the pleading are warranted, and the allegations and other factual contentions have evidentiary support. (Code Civ. Proc., § 128.7, subds. (b)(1)-(4).) If these standards are violated, a trial court may impose sanctions, including monetary sanctions, sufficient to deter future misconduct. (*In re Mark B.* (2007) 149 Cal.App.4th 61, 64.)

To begin with, we note Daniel claims that by bringing the section 859 motion, he was "acting on the court's August 21 suggestion that issues under section 859 or issues respecting a surcharge against Delia be brought back at a later time" Daniel references two pages from the reporter's transcript of the August 21, 2006, hearing. In the first reference, the probate court stated, "Well, I would presume that . . . those issues can all be brought back if they're not resolved in her amended account." The court was

responding to the charge of Daniel's counsel that they had not received an accounting "that would allow [them] to determine the amount she's to be surcharged to put back in the trust." In the second reference, the court asked about the issue of surcharging Delia. Delia's counsel responded that that issue was resolved by the court's prior denial. The court expressed its doubt that it could reconsider that issue; however, as for attorney's fees, the court stated it had "reserved it to a hearing today." After reviewing each reference, we find Daniel's claim that the court suggested he bring a section 859 motion to be misplaced. Glossing over this claim, Daniel then asserts that Delia failed to address his section 859 motion on its merits. Such assertion is irrelevant if, in fact, the motion was untimely.

Regarding the timing of his section 859 motion, Daniel contends that he could not have raised the issue of section 859 damages until after the court made a finding of bad faith. He further claims the order after trial is subject to collateral attack because it failed to award double damages. Delia responds that Daniel did seek damages under section 859 at trial, but they were denied. She further faults him for failing to challenge the denial via a motion for reconsideration or appeal.

As Delia aptly notes, despite the continuing nature of probate, a petition may result in an appealable final order that is binding and conclusive on all interested parties. (*Stephens v. Superior Court* (2002) 96 Cal.App.4th 54, 61.) Once the order is final, and the time for appeal has passed, the order is not subsequently subject to review, modification, or reversal. (*Estate of Wise* (1949) 34 Cal.2d 376, 382-383; *In re Estate of Davis* (1906) 151 Cal. 318, 323.)

Here, the probate court was asked to determine whether the L.A. property was an asset of the IVT, and if so, whether Delia acted in bad faith in failing to treat it as trust property. Daniel did not request section 859 damages in his amended petition. Although the transcript of the trial is not before this court, Daniel's trial brief, along with the transcripts from subsequent hearings, demonstrate the parties' and the court's awareness of section 859 damages. Further, the probate court clearly stated at the hearing on attorney's fees that it was "not changing the damages" to include section 859 damages. Because the records before this court suggest the issue of section 859 damages was tried at the same time as liability was tried, if Daniel did not like the court's decision, he should have filed a motion for reconsideration, or an appeal. (*Estate of Young* (2008) 160 Cal.App.4th 62, 92.) Instead, Daniel filed a section 859 motion seeking the damages and the attorney's fees the probate court had already stated it was not going to award. Such action amounted to a collateral attack on the court's final order after trial.

Because the issue of section 859 damages had already been decided, the probate court found that Daniel filed the section 859 motion for an improper reason. Daniel claims the "court's remarks from the bench when announcing the sanctions order also make it clear that the finding of an improper motive flowed entirely from the finding of a lack of merit." We disagree. According to the record, the court believed Daniel filed the motion because he "was attempting to cause severe distress to his stepmother" He had already been successful on his amended petition with exception of the section 859 damages and who would be responsible for the attorney's fees. To the extent he was not happy with the probate court's decision regarding those issues, he should have appealed

the order. By choosing to file the section 859 motion and not appeal the court's decision, Daniel sought the same damages he had requested but had been denied. We agree with the probate court and find that his motive was improper.⁹

Regarding the issue of Daniel's perjury, we find it irrelevant to our analysis. The purpose for raising this issue was to respond to Daniel's claim that Delia continued to act in bad faith. However, the section 859 damages apply only to Delia's bad faith actions in relation to the L.A. property which the probate court had already decided against her by finding that she had acted in bad faith.

⁹ We noted above that Daniel used different counsel to bring his section 859 motion. Although there is nothing in the record disclosing the reason for the change in counsel, given prior counsel's success in the petition to remove Delia and recover attorney fees, we question whether the decision to seek new counsel had to do with prior counsel's refusal to bring a section 859 motion. Moreover, although the trial court chose to sanction Daniel only, we note that his counsel, Mr. Smith, claimed to have "carefully reviewed the Second Amended Petition, July 19, 2006 Order After Trial, the August 23, 2006 Minute Order Re: Attorney's Fees, and the hearing transcript from the attorneys' fees hearing to determine whether the Section 859 issues had been pled, argued or decided." If Mr. Smith did carefully review these documents, he should have noted Mr. Stapke's (Daniel's prior counsel) statement that they "had contended during the trial and actually in posttrial briefing that [section] 859 of the Probate Code . . . would preclude her from recovering anything. . . . We also contended in those papers that she should be surcharged the amount of fees paid by the trust to us to win the case. And get the money back. Those are, again, contentions that the court apparently considered and did not accept in the course of reviewing and signing the final order . . . in the case."

III. DISPOSITION

The order awarding sanctions against Daniel in the amount of \$18,000 is affirmed.
Costs on appeal are awarded to Delia.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

GAUT

J.